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Void Marriages, Maintenance, and Matrimonial Assets: ADP v ADQ [2012] SGCA 6

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Void marriages, maintenance, and matrimonial assets

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***ADP v ADQ* [2012] SGCA 6**

Do Singapore courts have jurisdiction under the Women's Charter[1] to order maintenance and the division of matrimonial assets when a marriage has been declared void? This was the novel issue presented in *ADP v ADQ*,[2] and the Court of Appeal answered in the affirmative.

The context

The relevant facts can be briefly stated. A had married R in Hong Kong. However, this marriage was contracted before A's first marriage in Japan to someone else had terminated. This meant that the Hong Kong marriage was void on the ground of bigamy, although knowledge of this only emerged much later on. After the Singapore Family Court declared the Hong Kong marriage void, both the District Court and High Court held that they possessed no power to order maintenance and the division of matrimonial assets.

Central to the issue was the interpretation of two key provisions in the Women's Charter. First, s 112(1) states that the court shall have the power, when granting or subsequent to granting a "nullity of marriage", to order the division of matrimonial assets "in such proportions as the court thinks just and equitable." Second, s 113 states that the court may order a man to pay maintenance to his "wife or former wife" during the course of "any matrimonial proceedings" or when granting or subsequent to granting a "nullity of marriage".

The grounds of the decision

Whereas the High Court drew various distinctions between void and voidable marriages that eventually led it to decide that the court may have the power to order maintenance and the division of matrimonial assets for voidable but not void marriages,[3] the Court of Appeal took a different approach. Citing the legislative and historical background of ss 112 and 113,

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[1] Cap 353, 2009 Rev Ed.
[2] [2012] SGCA 6 at [1], [20].
[3] *ADP v ADQ* [2011] 3 SLR 370 at [8]–[18].

academic opinion, and general policy and principle, the Court of Appeal relied on the following points in coming to its decision:

(1) A purposive approach ought to be taken in statutory construction; however, if the meaning of the statutory language is plain and clear, the court must give effect to that meaning.[4]

(2) Part X Chapter III (titled "Nullity of Marriage") of the Women's Charter contains provisions relating to both void and voidable marriages.[5]

(3) Sections 112 and 113 do not refer to voidable marriages only.[6]

(4) Divorces and petitions for nullity both result in the disintegration of the family unit. Ancillary relief thus ought to be available even in the latter situation.[7]

(5) No cases have said that the court's exercise of ancillary powers should be attenuated where a marriage is void.[8]

(6) A void marriage is different from a "non-marriage"; the latter refers to a situation where the parties have no marital relationship whatsoever. In contrast, parties to a void marriage may have conducted themselves as if the marriage was valid.[9]

(7) Select Committee proceedings *vis-à-vis* predecessor provisions to ss 112 and 113 reveal that Parliament clearly intended the courts to have the discretion to order maintenance and the division of matrimonial assets even in void marriages.[10]

(8) Historically, the concept of nullity of marriage arose to mitigate the hardships engendered by the indissolubility of marriage, while the distinction between void and voidable marriages arose from a historical tussle that is no longer relevant today. Although void and voidable marriages are distinguishable in terms of legal consequences (especially where third parties are concerned), this does not affect the question of ancillary relief.[11]

(9) The well-established broad brush approach with regard to the division of matrimonial assets is consistent with a court having the power to award a portion of the assets to a spouse even in a void marriage if it is just and equitable in the circumstances.[12]

(10) It would neither have been more just nor more efficient for the spouse in a void marriage to resort to the general law instead for her financial claims.[13]

[4] *ADP v ADQ* [2012] SGCA 6 at [29].
[5] *ADP v ADQ* [2012] SGCA 6 at [30].
[6] *ADP v ADQ* [2012] SGCA 6 at [30].
[7] *ADP v ADQ* [2012] SGCA 6 at [37]–[40].
[8] *ADP v ADQ* [2012] SGCA 6 at [40].
[9] *ADP v ADQ* [2012] SGCA 6 at [41].
[10] *ADP v ADQ* [2012] SGCA 6 at [34]–[45].
[11] *ADP v ADQ* [2012] SGCA 6 at [47]–[62].
[12] *ADP v ADQ* [2012] SGCA 6 at [65].
[13] *ADP v ADQ* [2012] SGCA 6 at [41].

Some comments on the decision

Insofar as the issue of whether "nullity of marriage" (as found in ss 112 and 113) comprises both void and voidable marriages is concerned, the Court of Appeal's decision when examined as a whole is comprehensive, and legally and logically sound. However, two points are raised here for future consideration.

The first point to be raised is that with regard to the distinction drawn between void marriages and non-marriages, although the Court of Appeal identified the sole criterion of "a mutual intention to marry" as the distinguishing factor between the two types of marriages and it referred to this criterion as a fundamental contractual requirement of all marriages, using the lens of pure contractual analysis may not be entirely satisfactory. Indeed, the court acknowledged the "conceptual difficulties" that arise from the proposition that parties can derive rights from a marriage found void *ab initio* – since a contract that is void *ab initio* means it never existed and accordingly no rights and obligations attach to such a contract – and did not seem entirely comfortable endorsing a separate category of void contracts (in the form of non-marriages) whereby no such rights can be derived.[14] The unarticulated exacerbation of this tension lies in the fact that much more often than not, spouses do receive *some* maintenance and *some* portion of the pool of matrimonial assets to be divided, and there is no indication from the Court of Appeal that this will be *any different* for void marriages (but not non-marriages) as a matter of *principle*.

Perhaps a way to preserve (and indeed, not upend) the contractual notion of void *ab initio* while at the same time recognising that there are legal consequences to a void marriage, as opposed to a non-marriage, would be to recognise that there are other legal consequences that flow from a void marriage that do not arise out of the marriage *per se*. The key is to divorce the notion that the legal consequences that flow from a void marriage on which ancillary relief is based are derived from the voided marriage; by way of analogy, the fact that a contract is void *ab initio* does not *ipso jure* mean that there are no legal consequences flowing from the *relationship* between the parties to the voided contract. Indeed, where monies have passed pursuant to a voided contract, the party who had paid the monies under the voided contract has a legitimate claim against the party to whom the monies was paid. This claim in unjust enrichment is not dependent or derived from the voided contract – since no claim can be founded on the voided contract – but nevertheless arises out of the *relationship* between the parties to the voided contract.

Likewise, the fact that a marriage is void does not mean that there can be no legal consequences arising out of the marriage. It is thus plausible to recognise that a void marriage does not preclude an assertion of rights and remedies between the parties to the void marriage; this assertion of rights and remedies in turn founds the justification for ancillary relief being afforded to parties in certain void marriages.[15] From this perspective, parties to a void marriage are given rights arising from the marriage not because the marriage was at some point valid and subsisting, but because they were putative spouses to a putative marriage.[16] In this regard, the High Court's concern with the wording in s 113 of the Women's Charter, namely the references to only "wife" and "former wife" (with no reference to "non-wife" or something to that effect),[17] is also assuaged. It is submitted that a "wife" to a void marriage can qualify for maintenance under s 113 on the ground that a "former wife" should be read broadly to include "a putative wife".

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[14] *ADP v ADQ* [2012] SGCA 6 at [41].
[15] In the French legal system, it appears that the basis for giving spouses to a marriage void *ab initio* legal rights is the doctrine of good faith: see David Fine, "The Rights of Putative Spouses: Choice of Law Issues and Comparative Insights" (1983) 32(3) International and Comparative Law Quarterly 708 at 708–710.
[16] David Fine, "The Rights of Putative Spouses: Choice of Law Issues and Comparative Insights" (1983) 32(3) International and Comparative Law Quarterly 708 at 709.
[17] *ADP v ADQ* [2011] 3 SLR 370 at [16].

The second point to be raised is that the Court of Appeal could have taken the opportunity to provide guidance on what other factors the court should take into account in dividing matrimonial assets or calculating the quantum and duration of maintenance in what is essentially a *sui generis* context (*viz*, rights arising from void marriages which are not non-marriages). Absent such guidance, the logical presumption is that all the relevant factors are already covered by the Women's Charter; indeed, the Court of Appeal only committed itself to the rather tentative (and brief) position that there is "sufficient flexibility within the broad brush approach… such as to make it just and equitable that a particular spouse be given a low or (in extreme circumstances such as where the marriage is an exceedingly short one) little or no proportion of the matrimonial assets."[18] This is where it is apposite to revisit the trial judgment. Although the trial judge may have made the mistaken *conclusion* (that "nullity of marriage" only refers to voidable but not void marriages), there is possibly some force behind the *motivation* on which the conclusion was made. The relevant passage from the trial judgment is as follows:

> There are strong reasons which suggest that [the issue of ancillary relief arising out of void marriages] is not best resolved on a "yes" or "no" basis. *A marriage can be rendered void for different reasons*. Even if we restrict ourselves to the present case where a marriage that is void because one party is already married when the marriage is contracted, a party's knowledge and culpability may vary … an innocent party may be accorded rights and liabilities as though the marriage was legal, and a "guilty" party may be denied of any rights, and be subject to the liabilities. Needless to say, *there will be many variations to the facts which require the different treatments, and legal, sociological and public policy considerations will have to be taken into account*.
>
> *It is not appropriate for a court to extrapolate an answer as these matters should be addressed by the legislature* … Against the backdrop that a void marriage is not a marriage, the parties were not in a state of matrimony and there can be no matrimonial assets to be divided …
>
> Similarly, when s 113 states that a court may order a man to pay maintenance to his wife or former wife, that is predicated on the claimant being one or the other. In the case of a void marriage, the claimant is neither. Even if we assume that the court can overlook that as a technicality, there is no one correct solution. A "wife" who is unaware of the impediment would have a moral claim for maintenance, but a "wife" who suppressed the impediment so as to deceive the other party and the marriage authorities would have a weak claim.[19]

In other words, the trial judge did not think that a court is the proper province to determine issues of maintenance and division of matrimonial assets in the context of void marriages, because there will be too many moral variations to the facts that shape and determine the strength of any such claim to ancillary relief. In the trial judge's opinion, such complex considerations can only be properly addressed by the legislature. Notably, the judicial aversion to such (perceived) open-ended moral inquiries finds similar expression in the context of a rejected variant of void marriages, *viz*, sham marriages. In *Toh Seok Kheng v Huang Huiqun* for instance,[20] the High Court maintained that no special moral status is accorded to marriages and that in any event, "the tension between the contractual and institutional perspectives of marriage upon which the concept of a sham marriage rests *cannot be resolved* by the courts."[21] Here, on the one hand, the Court of Appeal (in *ADP v ADQ*) is saying that the court is entirely well-placed to deal with the moral variations to the

[18] *ADP v ADQ* [2012] SGCA 6 at [65].
[19] *ADP v ADQ* [2011] 3 SLR 370 at [14]–[16] (emphasis added).
[20] [2011] 1 SLR 737. See also *Tan Ah Thee v Lim Soo Foong* [2009] 3 SLR(R) 957.
[21] *Toh Seok Kheng v Huang Huiqun* [2011] 1 SLR 737 at [11] (emphasis added).

facts when answering questions of maintenance and division of matrimonial assets even after a marriage has been found void, without seeing the need to explicate how this can be done.[22] On the other hand, the High Court (in *ADP v ADQ*) is effectively saying that the Women's Charter does not offer sufficient guidance in such a situation; analogously, cases such as *Toh Seok Kheng v Huang Huiqun* suggest that a court should not venture into uncharted moral territory unless the Women's Charter provides for it.[23] While the broad brush approach may provide satisfactory answers to the majority of cases, there will inevitably be that small category of cases where one spouse is so much more blameworthy than the other. The question thus is in such situations, is the court ready to impute considerations of morality into the flexible, broad brush, overarching principle of "just and equitable"? The answer can cut both ways and the more important point is that the law should reduce uncertainty, not contribute to it.

Obviously, as in any other area of law, the best solution is legislative reform that injects clarity. If the *status quo* remains, it seems that the only way to reconcile the basic philosophy underlying the local family law jurisprudence is to say that the court is only prepared to go as far as what parliament has clearly mandated via legislation (the Women's Charter in this case). Perhaps that was the constraint which straitjacketed the Court of Appeal. The plain and ordinary wording of ss 112 and 113 of the Women's Charter, together with the parliamentary preparatory materials, clearly supports – even mandates – the Court of Appeal's conclusion that ancillary relief for both void (excluding non-marriages) and voidable marriages was envisaged under Part X of the Women's Charter. Therein lies the problem: Parliament has prescribed what is strictly a legal absurdity without explaining how the courts can circumvent this absurdity. In these circumstances, the most feasible option may simply be to state the law in as broad terms as practicable, which was precisely what the Court of Appeal did.

[22] Put another way, the Women's Charter either provides sufficient guidance or endows a broad enough discretionary mandate on the court.

[23] The court held at [12] that the court cannot declare a marriage void on grounds other than those in the Women's Charter; accordingly, the court cannot declare a sham marriage void. But see cases in which the court has not refrained from preventing parties from forming an agreement to resile from a marriage: *eg*, *Kwong Sin Hwa v Lau Lee Yen* [1993] 1 SLR(R) 90 at [38].